



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

July 20, 2010

CBCA 2018-FEMA

In the Matter of BALDWIN COUNTY BOARD OF SUPERVISORS

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Linda D. Litke, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Biloxi, MS; and Charles D. Barksdale and Courtney Dow, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC, counsel for Federal Emergency Management Agency.

Before the Arbitration Panel consisting of Board Judges **DANIELS** (Chairman), **VERGILIO**, and **KULLBERG**.

The Federal Emergency Management Agency (FEMA) has moved the arbitration panel to reconsider its July 2, 2010, ruling that the panel has jurisdiction to consider an application filed by the Baldwin County (Alabama) Board of Supervisors.

FEMA notes that 44 CFR 206.209(e)(2) (2009) provides that “[a]n applicant . . . must submit its request for arbitration . . . within 30 calendar days after receipt of notice of the determination that is the subject of the arbitration request or by September 30, 2009, whichever is later.” The agency observes that its initial determination in this matter was dated August 11, 2009. It maintains that the deadline for filing a request for arbitration was therefore September 30, 2009, and because Baldwin County did not file its request until May 13, 2010, the panel may not consider the case.

The majority of the panel held in the July 2 ruling that the determination from which the request for arbitration was taken was the agency's first appeal decision. This decision was received by the applicant on April 15, 2010. Consequently, the deadline for filing here was May 15, 2010, not September 30, 2009. The fact that Baldwin County filed on May 13, 2010, made its filing timely.

FEMA's request for reconsideration is denied.

H. CHUCK KULLBERG
Board Judge

STEPHEN M. DANIELS
Board Judge

VERGILIO, Board Judge.

Unlike the majority of this panel, I would grant the motion of the Federal Emergency Management Agency (FEMA) and dismiss this matter as untimely filed. FEMA correctly interprets its own regulations; it is improper for this panel to reach a contrary conclusion. *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). I conclude that the panel lacks authority to resolve the arbitration.

Of relevance here are long-established FEMA regulations describing an appeal process, 44 CFR 206.206 (2009) (section 206), and more recently issued FEMA regulations describing a new arbitration process and its relationship to the appeal process, 44 CFR 206.209 (2009) (section 209), 74 Fed. Reg. 44,761-69 (2009).

Regarding federal assistance under FEMA, section 206 describes the appeal process:

An eligible applicant, subgrantee, or grantee may appeal any determination previously made related to an application for or the provision of Federal assistance according to the procedures below.

44 CFR 206.206. Two levels of appeal are specified:

(1) The Regional Administrator will consider first appeals for public assistance-related decisions under subparts A through L of this part.

(2) The Assistant Administrator for the Disaster Assistance Directorate will consider appeals of the Regional Administrator's decision on any first appeal under paragraph (b)(1) of this section.

44 CFR 206.206(b).

Pursuant to the American Recovery and Reinvestment Act of 2009, Pub. L. 111-5 § 601, 123 Stat. 115, 164, the President established an arbitration panel under the FEMA public assistance program to expedite the recovery efforts from Hurricanes Katrina and Rita. Statute specifies that the "arbitration panel shall have sufficient authority regarding the award or denial of disputed public assistance applications for covered hurricane damage[.]" With an effective date of August 31, 2009, FEMA issued the section 209 regulations addressing the arbitration process within the public assistance program. This Board has issued no regulations applicable to these arbitration proceedings.

The regulations describe the availability of the arbitration process at this Board:

An applicant . . . may request arbitration of a determination made by FEMA on an application for Public Assistance, provided that the total amount of the project is greater than \$500,000, and provided that:

- (1) the applicant is eligible to file an appeal under § 206.206; or
- (2) the applicant had a first or second level appeal pending with FEMA pursuant to § 206.206 on or after February 17, 2009.

44 CFR 206.209(b).

Further, section 209 specifies the time constraints for submitting a request for arbitration:

An applicant under paragraph (b)(1) of this section must submit its request for arbitration in writing . . . within 30 calendar days after receipt of notice of the determination that is the subject of the arbitration request or by September 30, 2009, whichever is later. An applicant under paragraph (b)(2) of this section

must make a request for arbitration in writing and, if FEMA has not issued a decision on the appeal, submit a withdrawal of the pending appeal, simultaneously to the Grantee, the FEMA Regional Administrator, and the arbitration administrator by October 30, 2009.

44 CFR 206.209(e)(2). These two variants must be analyzed.

From the submissions, it appears to be undisputed that by letter dated August 11, 2009, FEMA issued the determination underlying this dispute. The applicant received the determination on August 21, 2009. On August 31, 2009, the section 209 arbitration regulations were published and became effective. On October 13, 2009, the applicant submitted a first level appeal pursuant to section 206. On April 5, 2010, FEMA issued a decision denying the first level appeal. The Board received the request for arbitration on May 13, 2010.

On October 13, 2009, the applicant was eligible to file a first level appeal under section 206. On October 13, the applicant filed an appeal; it did not seek arbitration. However, under section 209(e)(2), by that date, the applicant no longer was eligible to seek arbitration at this Board because it no longer was within thirty days of when the applicant received the disputed determination and it was after September 30, 2009. Therefore, under section 209(e)(2), with its request for arbitration in May 2010, the applicant under paragraph (b)(1) was untimely in seeking arbitration after September 30, 2009.

The applicant had a first level appeal pending after February 17, 2009. It neither filed its request for arbitration by October 30, 2009, nor submitted a withdrawal of its pending appeal by October 30, 2009. Therefore, under section 209(e)(2), the applicant under paragraph (b)(2) was untimely in seeking arbitration in May 2010.

Accordingly, under the arbitration regulations, the applicant's request for arbitration (made in May 2010) is untimely.

The majority here treats the first level appeal decision as a determination that may be appealed. Such an interpretation is inconsistent with the language and structure of the regulations (arbitration is to be used in lieu of the appeal process, section 209(c) and (d)), and ignores the express guidance issued with and applicable under the regulations (the "use of only one review procedure, arbitration or appeal, is more expeditious than two consecutive review procedures"; applicants are not to pursue both an appeal and arbitration).

The regulations specify that the arbitration panel shall determine the timeliness of an arbitration request. 44 CFR 206.209(i). The regulations do not authorize the panel to resolve an untimely-submitted arbitration matter.

If FEMA has resolved the second level appeal (given that there is no indication that the applicant has withdrawn that appeal to date), it should submit the decision on that appeal to this panel prior to the hearing. Whether through this arbitration process or the appeal procedures, it seems that the applicant is entitled to an expeditious decision after consideration of the applicable laws, regulations, and facts.

JOSEPH A. VERGILIO
Board Judge